APPELLANT PRO SE:

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ATTORNEYS FOR APPELLEE:

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IN THE COURT OF APPEALS OF INDIANA

ROBERT LEE PEACHER,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A05-0508-PC-493
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya Walton Pratt, Judge
Cause No. 49G01-9508-PC-121394

September 18, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-petitioner Robert Lee Peacher appeals from the denial of his petition for post-conviction relief. In particular, he argues that he received the ineffective assistance of trial, appellate, and post-conviction counsel. Finding no error, we affirm the judgment of the post-conviction court.

FACTS

The underlying facts, as recounted in our memorandum opinion issued following Peacher's direct appeal, are as follows:

> At approximately 5:30 a.m. on August 25, 1995, the victim was driving to her job at Castleton Square Mall in Indianapolis. She was to meet with a group of coworkers and travel to another city for training. While waiting at a stoplight to turn into the mall parking lot, she noticed Peacher driving a damaged Ford Escort, also waiting to make the same turn. The victim turned into the parking lot and proceeded to the designated employee parking area to wait on her coworkers.
>
> As she waited in her car, she noticed Peacher driving back and forth in the parking lot. When she had not seen Peacher's car for a period of time, she got out of her car to retrieve some items from the trunk. After she got back into her car, her car door opened suddenly and Peacher, who was wearing a nylon stocking over his face, forced a red cloth over her face, partially covering her eyes. He then got into the back seat of the car and instructed her to drive. The victim felt a knife at her throat. Peacher threatened to kill her if she did not comply with his demands.
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> While attempting to drive where Peacher demanded, the victim struck a curb and the car stopped. Peacher then forced the victim out of her car and, still holding a knife to her throat, led her to an area against a building. He ordered her to take off her shoes, socks and panties. After she complied, Peacher tied her hands behind her back with a black nylon strap. While pushing the victim against the building, Peacher placed his fingers in her vagina. The victim heard something metallic hit the pavement and a crumpling noise, like the sound of a condom wrapper being ripped open. The victim saw a mall security vehicle in the reflection of the windows of the building against which she was forced. She worked her hands free and ran toward the security vehicle. Peacher ran in the opposite direction.

> The victim was able to give police a description of Peacher. After a radio dispatch was made, an officer of the Fishers Police Department saw Peacher's vehicle and made a traffic stop. As the officer approached Peacher's vehicle on foot, Peacher drove off. After a short chase, Peacher was apprehended and placed in the police car. Police found a nylon stocking, a red cloth, a kitchen knife and an empty condom wrapper in the Ford Escort. Another condom wrapper was later found in the police car in which Peacher had been sitting. The Ford Escort also contained a black gym bag that did not have a strap. Peacher was taken back to the scene, where he was identified by the victim.

Peacher v. State, No. 49A04-9802-CR-108, slip op. p. 2-3 (Ind. Ct. App. Dec. 11, 1998).

The State charged Peacher with class A felony attempted rape, class A felony criminal deviate conduct, two counts of class B felony criminal confinement, and class A misdemeanor resisting law enforcement. A jury found Peacher guilty as charged and on January 9, 1998, the trial court sentenced Peacher to an aggregate term of 141 years. Peacher filed a direct appeal, arguing that the State improperly commented on his right not to testify, that the trial court erroneously imposed consecutive sentences, and that the trial court erroneously admitted hearsay and speculation at the sentencing hearing. A panel of this court affirmed the judgment of the trial court.

On April 15, 2003, Peacher filed a petition for post-conviction relief, ultimately arguing that he received the ineffective assistance of trial and appellate counsel. On August 9, 2005, the post-conviction court denied Peacher's petition. Peacher now appeals.

I. Standard of Review

Peacher contends that the post-conviction court erred in denying his petition for post-conviction relief. As we analyze Peacher's specific arguments, we observe that the petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); McCarty v. State, 802 N.E.2d 959, 962 (Ind. Ct. App. 2004), trans. denied. When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Post-conviction procedures do not afford petitioners with a "super appeal." Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003). Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based upon grounds enumerated in the post-conviction rules. Id.; see also P-C.R. 1(1).

II. Assistance of Counsel

A. Trial Counsel

Peacher first contends that he received the ineffective assistance of trial counsel. In particular, Peacher argues that his trial attorney, Howard Bernstein, was ineffective for: (1) failing to conduct adequate pretrial investigation and discovery; (2) failing to object to

two jury instructions regarding the attempted rape charge; and (3) failing to object, based on double jeopardy, to Peacher's convictions for two counts of criminal confinement.[1]

As we consider these arguments, we observe that when evaluating a claim of ineffective assistance of counsel, we apply the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984). Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). First, the defendant must show that counsel's performance was deficient. Strickland, 446 U.S. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments. Id. at 686-87. Second, the defendant must show that the deficient performance resulted in prejudice. Id. To establish prejudice, a defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. We will not lightly speculate as to what may or may not have been an advantageous trial strategy, as counsel should be given deference in choosing a trial strategy that, at the time and under the circumstances, seems best. Whitener v. State, 696 N.E.2d 40, 42 (Ind. 1998).

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[1] Peacher also argues that Bernstein "failed to object to a jury instruction that shifted the burden of proof to Peacher." Amended Appellant's Br. p. 15. But he neither indicates which of the instructions included the so-called mandatory presumption nor how the instruction placed the burden on him. Consequently, Peacher has waived the issue for failing to develop a meaningful argument. Ind. Appellate Rule 46(A)(8)(a).

1. Pretrial Investigation and Discovery

As we consider Peacher's argument that Bernstein failed to conduct the pretrial investigation and discovery processes adequately, we observe that to succeed on such an argument, the defendant must go beyond the trial record to show what the investigation, if undertaken, would have produced. Woods v. State, 701 N.E.2d 1208, 1214 (Ind. 1998).

Before delving into Peacher's specific arguments, we observe that Bernstein vigorously cross-examined the victim, questioning many details of her recollection of the incident. Additionally, in his closing statement, Bernstein attacked the victim's identification of Peacher, mentioned another vehicle that was in the parking lot at the time of the incident, mentioned that it was dark during the attack but daylight during the identification, and argued that it was not unusual for a man to have a condom in his car. Tr. p. 756-68. Furthermore, the record reveals that the police found a nylon stocking, a red cloth, a kitchen knife, an empty condom wrapper in Peacher's Ford Escort, and another condom wrapper in the police car in which Peacher had been sitting, that Peacher was apprehended by the police shortly after the incident only a few miles away, and that the victim identified Peacher as her assailant. Peacher, slip op. p. 3.

Peacher first argues that Bernstein failed to conduct an adequate pretrial investigation because he only met with Peacher six times before trial.[2] Our review of the record reveals that Bernstein was appointed to represent Peacher mid-stream, after another attorney had

[2] There is no evidence in the record supporting Peacher's contention that each meeting lasted for less than five minutes. Amended Appellant's Br. p. 18.

already done much of the early preparation of Peacher's case. Thus, by the time Bernstein began working on Peacher's case, the victim had already been deposed and the State had already provided discovery. Under these circumstances, Peacher cannot establish that Bernstein was ineffective for failing to meet with him more frequently before the trial began.

Peacher next argues that Bernstein was ineffective for failing to investigate and locate witnesses who could have testified that Peacher and the victim knew each other and were together on the night of the incident. But Peacher neither raised this argument before the post-conviction court nor questioned Bernstein about these witnesses at the post-conviction hearing. Consequently, Peacher has waived this argument and we cannot conclude that Bernstein was ineffective on this basis.

Peacher next contends that Bernstein was ineffective for failing to interview and depose two State's witnesses, but fails to specify who the witnesses are or why the interviews and depositions would have affected the outcome of his case. And again, he failed to question Bernstein about these witnesses at the post-conviction hearing. Thus, this argument must fail.

Next, Peacher argues that Bernstein failed to consult or discuss the case with Peacher's former attorney. Peacher also contends that Bernstein privately told Peacher that he had no defense prepared, that he had not searched for witnesses, and that if "forced to put on a defense, he told [Peacher] he would simply put him on the stand and let the State 'crucify' him." Amended Appellant's Br. p. 21. There is no evidence in the record supporting these contentions.

Additionally, Peacher contends that Bernstein was ineffective for failing to conduct an adequate cross-examination of the victim by questioning her about statements that she made in the deposition conducted by Peacher's former attorney. Specifically, he argues that Bernstein should have questioned her about a similar rape allegation she had made a number of years earlier that allegedly took place in the same location under the same circumstances. Initially, we note that although Bernstein did not specifically question the victim about her former complaint, he ensured that her deposition was published in open court. Furthermore, he conducted a full and vigorous cross-examination, questioning her about her statement to the police, her deposition, and her recollection of the details of the incident. Tr. p. 484-518, 520-22. Finally, we note that Peacher has not sufficiently explained why evidence regarding the former, unrelated complaint would have been at all relevant for the purposes of his trial. Under these circumstances, we conclude that Bernstein was not ineffective on this basis, and that even if he was, Peacher has not established that he was prejudiced as a result.

Finally, Peacher argues that Bernstein was ineffective for failing to discover, until mid-trial, that there was another blue Ford Escort in the parking lot at the time of the assault. When Bernstein cross-examined a Fishers police officer, he learned of this other vehicle's presence for the first time. Tr. p. 762. According to Peacher, if Bernstein had conducted an adequate pretrial investigation, he would have discovered the other vehicle and made that a central portion of Peacher's defense.

Initially, we note that Bernstein testified at the post-conviction hearing that the officer did not know what the other vehicle's license plate number was, so "there would have been

no way to" have identified the other vehicle. PCR Tr. p. 11. Furthermore, we note that in his closing statement, Bernstein highlighted the presence of the other vehicle, arguing that it created reasonable doubt because it may have been owned by "the true assailant . . . ." Tr. p. 762. Finally, we observe that even if Bernstein was ineffective on this basis, in light of the evidence in the record supporting the jury's verdict, including the nylon stocking, red cloth, knife, and empty condom wrapper found in Peacher's vehicle, we cannot conclude that Peacher suffered prejudice as a result of Bernstein's failure to uncover the presence of the other vehicle. Thus, we conclude that the post-conviction court properly determined that Peacher did not receive the ineffective assistance of trial counsel on this basis.[3]

2. Jury Instructions

Peacher next argues that Bernstein was ineffective for failing to object to two jury instructions regarding attempted rape. Counsel cannot be faulted for failing to make an objection which had no hope of success. Garrett v. State, 602 N.E.2d 139, 141 (Ind. 1992). Thus, the defendant must establish that if a proper objection had been made, the court would have had no choice but to sustain it. Id.

The trial court gave the jury the following instruction on attempted rape:

> The crime of attempted rape is defined by statute as follows:
>
> "A person who knowingly or intentionally has sexual intercourse with a member of the opposite sex when the other person is compelled

[3] Peacher argues for the first time in his reply brief that Bernstein should have objected to the admission of certain photographs, filed a motion to suppress the photographs, filed a motion to dismiss "due to bad faith destruction of exculpatory evidence by police," and cross-examined the victim about her actions with respect to the crime scene. Reply Br. p. 9-10. Because he raises these arguments for the first time in his reply brief, we will not consider them. Chupp v. State, 830 N.E.2d 119, 126 (Ind. Ct. App. 2005).

by force or imminent threat of force, commits Rape, a class B felony. However, the offense is a class A felony if it is committed by using or threatening the use of deadly force, if it is committed while armed with a deadly weapon, or if it results in serious bodily injury to a person other than the defendant

A person attempts to commit Rape when, acting with the culpability required for commission of the crime, he engages in conduct that constitutes a substantial step toward commission of the same class as the crime attempted."

To convict Defendant, Robert Peacher, of Attempted Rape, as charged in Count I of the Information, the State must have proved each of the following elements:

That the Defendant, Robert Peacher, did on or about August 25, 1995,

1. Attempt the crime of Rape, that is, the said Defendant did knowingly or intentionally attempt to have sexual intercourse with L.O., a member of the opposite sex,

2. when L.O. was compelled by deadly force or the threat of deadly force to submit to such sexual intercourse,

3. by engaging in conduct, that is: knowingly forcing L.O. to remove her shoes and panties and pulling out a wrapped condom,

4. which constituted a substantial step toward the commission of said crime of Rape.

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant, Robert Peacher, not guilty of Attempted Rape as charged in Count I of the Information.

If the State did prove each of these elements beyond a reasonable doubt, you should find the Defendant, Robert Peacher, guilty of Attempted Rape as charged in Count I of the Information.

Tr. p. 237-38.

Peacher first seems to contend that the instruction does not adequately require the jury to find that he took a substantial step toward commission of the crime because, according to Peacher, forcing the victim, at knifepoint, to remove her shoes and panties and pulling out a wrapped condom does not constitute a substantial step. More specifically, Peacher argues that the State was required to prove that he committed an act involving his penis and that when he engaged in the described conduct, he intended to rape the victim.

Initially, we observe that to prove the crime of attempted rape, the State only needs to prove that the defendant acted "knowingly." McCann v. State, 742 N.E.2d 998, 1004-05 (Ind. Ct. App. 2001), summarily aff'd in relevant part and vacated on other grounds, 749 N.E.2d 1116 (Ind. 2001). Thus, the instruction correctly informed the jury that the State had to prove that Peacher acted "knowingly or intentionally . . . ." Tr. p. 237-38.

Next, we note that what constitutes a substantial step depends on the facts of the case, but the requirement is a minimal one and is often defined as any overt act in furtherance of the crime. Oeth v. State, 775 N.E.2d 696, 700 (Ind. Ct App. 2002). As to the facts of this case, the record reveals that Peacher forced the victim to drive her car to a different location, threatened to kill her if she did not comply, forced her out of her vehicle, and, holding a knife to her throat, ordered her to take off her shoes, socks, and panties, tied her hands behind her back with a black nylon strap, inserted his fingers into her vagina, and then ripped open a condom wrapper. Peacher, slip op. at 2-3. Given the facts of this case, we conclude that the jury was properly instructed that if it found that Peacher compelled the victim by deadly force to remove her shoes and panties and then pulled out a condom, that conduct sufficiently

qualified as a substantial step in furtherance of the crime of rape. Thus, Bernstein was not ineffective for failing to object to the instruction.

Peacher next finds fault with Bernstein's failure to object to the jury instruction on attempt, which provided as follows: "In determining whether the Defendant has 'attempted,' or has taken a substantial step toward the commission of a crime, the focus is on what has been completed, not on what remains to be done. Acts of a substantial step is [sic] an overt act beyond mere planning or preparation." Tr. p. 246. Peacher argues that this instruction is improper because it did not inform the jury "that Peacher must have had the 'intent' to commit the crime of rape." Amended Appellant's Br. p. 12.

As noted above, to prove the crime of attempted rape, the State only needs to prove that the defendant acted "knowingly." McCann, 742 N.E.2d at 1004-05. Thus, the attempted rape instruction correctly and sufficiently informed the jury that the State had to prove that Peacher acted "knowingly or intentionally . . . ." Tr. p. 237-38. Although the instruction on attempt did not include the required mens rea, the instruction on attempted rape adequately covered the issue. Consequently, any error was harmless and Bernstein was not ineffective for failing to object to the instruction. See Alvies v. State, 795 N.E.2d 493, 505 (Ind. Ct. App. 2003) (holding that trial court did not err in refusing to give defendant's tendered jury instruction where substance was covered by other instructions and instructions as a whole were adequate).

3. Criminal Confinement

Peacher next contends that Bernstein was ineffective for failing to object to his convictions for two counts of criminal confinement. Specifically, he argues that the two counts of criminal confinement are lesser included offenses of his convictions for attempted rape and criminal deviate conduct.

Generally, one who commits rape or criminal deviate conduct necessarily "confines" the victim at least long enough to complete the forcible crime. Gates v. State, 759 N.E.2d 631, 632 (Ind. 2001). But if the confinement exceeded the bounds of the force used to commit the rape and/or criminal deviate conduct, then the defendant may properly be convicted of both crimes. Id.

In Count III, Peacher was charged with and convicted of criminal confinement for removing the victim from her car while holding a knife to her throat. In Count IV, Peacher was charged with and convicted of criminal confinement for tying the victim's hands with a nylon strap while armed with a knife. It is apparent that Peacher's confinement of the victim, as charged in Counts III and IV, was "distinct and elevated from the restraint necessary to complete the other charged crimes." Id. Specifically, the confinement charged in Count III was not necessary for the commission of the criminal deviate conduct or the attempted rape, and, indeed, did not even take place at the same time. Similarly, the confinement charged in Count IV included unnecessary force for the commission of the criminal deviate conduct and attempted rape and lengthened the victim's confinement beyond the time necessary to commit the other crimes. Consequently, Peacher's convictions did not run afoul of double

jeopardy and Bernstein was not ineffective for failing to object on that basis. The post-conviction court properly concluded, therefore, that Peacher did not receive the ineffective assistance of trial counsel.

B. Appellate Counsel

Peacher next argues that he received the ineffective assistance of appellate counsel, based upon his appellate counsel's failure to raise the ineffective assistance of trial counsel on direct appeal. Briefly, we observe that claims of ineffective assistance of appellate counsel are reviewed using the same standard applicable to claims of trial counsel ineffectiveness. Bieghler v. State, 690 N.E.2d 188, 193 (Ind. 1997). To show that counsel was deficient for failing to raise an issue on direct appeal, i.e., waiving the issue, the defendant must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential. Ben-Yisrayl v. State, 738 N.E.2d 253, 261 (Ind. 2000). Our Supreme Court has adopted the following test to evaluate the performance prong of appellate counsel's performance: (1) whether the unraised issues are significant and obvious from the record; and (2) whether the unraised issues are "clearly stronger" than the issues that were presented. Bieghler, 690 N.E.2d at 194.

Here, we have already determined that Peacher's trial counsel was not deficient, but even if he was, Peacher has not established that he suffered prejudice as a result. Consequently, it is apparent that the issue is not clearly stronger than the issues that were presented on direct appeal, and Peacher's argument on this basis must fail.

C. Post-Conviction Counsel

Finally, Peacher argues that he received ineffective assistance of post-conviction counsel. In considering this claim, we observe that claims regarding the performance of a post-conviction attorney are subject to the holding of Graves v. State, 823 N.E.2d 1193, 1195-97 (Ind. 2005). In Graves, our Supreme Court concluded that post-conviction proceedings, which are not criminal in nature, need not be conducted under the Strickland standards. Id. Instead, the standard is whether "counsel in fact appeared and represented the petitioner in a procedurally fair setting which resulted in a judgment of the court," also reaffirming its prior holding that a claim of defective performance in a post-conviction proceeding "poses no cognizable grounds for post-conviction relief." Id. at 1196.

Essentially, Peacher argues that his post-conviction counsel was ineffective for failing to bring Bernstein's "perjury," amended appellant's br. p. 23, in the post-conviction hearing to the attention of the post-conviction court. First, he argues that Bernstein perjured himself when he testified that the crux of his defense was the presence of the other, identical vehicle at the scene of the crime. We agree that it is unlikely that the other vehicle was the crux of Peacher's defense, inasmuch as Bernstein did not become aware of its presence until midway through trial. But there is no evidence that Bernstein committed perjury, inasmuch as he later made clear that his theory of defense was mistaken identity, which was eventually buoyed by the discovery of the second vehicle. Moreover, Bernstein repeatedly hedged his testimony with statements such as, "[i]f I recall correctly," PCR Tr. p 9, noting frequently that he had not had a chance to review his closing argument or the case file. Id.

Moreover, it is clear that Bernstein ultimately decided to use a mistaken identity defense and that the other vehicle ended up playing a role in that defense. Bernstein testified that "the defense of this case changed many times," that Peacher wanted him to pursue defenses with which he felt uncomfortable, and that ultimately the theory he felt comfortable pursuing was the one that he pursued. Id. p. 11. It is apparent that the other vehicle did play a role in Peacher's defense, inasmuch as Bernstein repeatedly highlighted its presence during his closing argument. Thus, Peacher has not established that Bernstein committed perjury or that his post-conviction attorney was ineffective for failing to raise the issue.

Peacher next argues that Bernstein perjured himself when he testified that he met with Peacher a dozen times before Peacher's trial, although the jail records reveal that they met only six times. In its entirety, Bernstein's testimony on the issue is as follows:

> Oh, I met with Mr. Peacher a number of times at the jail, many times. I can't tell of [sic] exactly how many, but, my guess would be at least a dozen, probably more. Though the jail record would be the best reflection of that, but—or the file, the Public Defender file should have copies of my notes from the meetings.

PCR Tr. p. 18. It is apparent, therefore, that while Bernstein may have misremembered the number of times he met with Peacher, he was not attempting to mislead the post-conviction court. Rather, as he acknowledged, his memory was faulty and he suggested that the court examine the jail record or the case file rather than rely on his recollection. Thus, Peacher's post-conviction counsel was not ineffective for failing to raise this issue.

The judgment of the post-conviction court is affirmed.

MAY, J., concurs.

SULLIVAN, J., concurs as to Parts I, II (A)(1), II (A)(3), II (B) and II (C). Concurs in Result as to Part II (A)(2).